Jeyaretnam Joshua Benjamin v Lee Kuan Yew

COURT OF APPEAL (SINGAPORE) — MOTION IN CIVIL APPEAL NO 65 OF 1990
YONG PUNG HOW CJ, THEAN AND CHAN SEK KEONG JJ
26 APRIL 1991

Civil Procedure — Appeal — Application to strike out a paragraph of the petition of appeal on the ground that it was an appeal against refusal of an application — Plain reading of notice of appeal and petition of appeal — Paragraph forming one of the grounds of appeal — Rules of the Supreme Court 1970, O 57 r 4(1)(b)

The respondent applied by motion to strike out a paragraph of the appellant's petition of appeal, which stated that the learned trial judge ought to have acceded to the submission made by the appellant that he should disqualify himself from hearing the action on the ground of apparent bias. This application to the trial judge to disqualify himself had been rejected at the trial. The respondent argued that the application was an application in terms of O 57 r 4(1)(b) of the Rules of the Supreme Court 1970 and no notice of appeal against the judge's refusal to accede to the application had been filed and served as required under that Order.

Held, dismissing the motion:
It is unnecessary to determine whether the application by the appellant to disqualify the judge was an application in terms of O 57 r 4(1)(b). A plain reading of the notice of appeal and the petition of appeal shows that the appeal is directed at the decision of the judge at the end of the trial, and not his decision to disqualify himself made in the course of the trial. The impugned paragraph was simply one of the grounds in which the appellant sought to reverse or set aside the judgment.

Cases referred to
1 *Aviagents* v *Balstravest Investments Ltd* [1966] 1 WLR 150 (refd)
2 *Burgess* v *Stafford Hotel Ltd* [1990] 1 WLR 1215 (refd)
3 *Jones* v *Andrew* (1888) 58 LT 601 (refd)
4 *Re Roberts* [1890] WN 23 (refd)
5 *Trail* v *Jackson* (1876) 4 Ch D 7 (refd)
6 *Laird* v *Briggs* (1881) 16 Ch D 663 (refd)
7 *Ooi Phee Cheng* v *Kok Yoon San* [1951] MLJ 135 (distd)

Legislation referred to
Rules of the Supreme Court 1970 0 57 r 4(1)

Rajan Nair for the appellant.
Tan Kok Quan for the respondent/applicant.

Cur Adv Vult

Chan Sek Keong J (delivering the judgment of the court). This was an application by the respondent to strike out para 4(1) of the petition of appeal. After hearing the arguments of counsel for the respondent and for the appellant, we dismissed the motion with costs. We now give our reasons.

At the commencement of the trial of the action before the High Court on 2 July 1990, counsel for the defendant, the appellant in this appeal, made an application to the judge trying the action to disqualify himself on the ground of apparent bias. The judge rejected the application and proceeded with the trial which concluded on 6 July 1990. On 3 August 1990, the judge delivered a written judgment in favour of the plaintiff.

On 15 August 1990, the appellant filed a notice of appeal in these terms:

> Take notice that [the appellant] being dissatisfied with decision of [the judge] given at Singapore on [3 August 1990] appeals to the Court of Appeal against the whole of the said decision.

On 4 December 1990, he filed his petition of appeal, the relevant paragraphs of which are as follows:

> 3 By judgment dated [3 August 1990] the learned judge gave judgment for the respondent and ordered the appellant to pay damages of $260,000 with interest thereon from [1 September 1988] and also ordered the appellant to pay the costs of the action.
>
> 4 Your petitioner is dissatisfied with the said judgment on the grounds following:
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> (1) The learned trial judge ought to have acceded to the submission made on behalf of the appellant that he should disqualify himself from hearing the action on the ground of apparent bias.
> (2) The learned trial judge erred in law and in fact in holding ...
> (5) Your petitioner prays that such judgment may be reversed or set aside or that such judgment may be made or given as to this honourable court may seem just in all the circumstances.

The respondent filed a notice of motion to strike out para 4(1) of the petition of appeal on the ground that no notice of appeal against the judge's refusal to accede to the application had been filed and served as required by O 57 r 4(1) of the Rules of the Supreme Court 1970. Although there was no express provision in the Rules of the Supreme Court 1970 which enabled this court to hear an application of this nature, counsel for the respondent referred us to a number of decisions of the English Court of Appeal which decided that it had the power to do so by virtue of its inherent jurisdiction over its own proceedings. Two of the decisions were *Aviagents* v *Balstravest Investments Ltd*[1] and *Burgess* v *Stafford Hotel Ltd*.[2] Counsel for the appellant conceded that this court had jurisdiction.

Rule 4(1) provides as follows:

> Subject to the provisions of this Rule, every notice of appeal must be filed and served under Rule 3(6) within one month —
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> (a) in the case of an appeal from an order in Chambers, from the date when such order was pronounced or when the appellant first had notice thereof;
> (b) in the case of an appeal against the refusal of an application, from the date of such refusal;
> (c) in all other cases, from the date on which the judgment or order appealed against was pronounced.

Counsel for the respondent contended that the refusal by the judge of the application to disqualify himself fell within the terms of para (b) as it was distinct and separate from the case, and notice of appeal not having been lodged in time, there was no appeal at all and so that paragraph ought to be struck out. Counsel relied on the following authorities: *Jones* v *Andrew*,[3] *Re Roberts*[4] and *Trail* v *Jackson*,[5] all of which were decided under the corresponding English rule.

Jones v *Andrew*[3] concerned an interlocutory application. J, the principal who was suing A, his agent, for an account, had obtained an order for an affidavit of documents by A. A then obtained leave to seal up portions of the documents which were irrelevant. J applied for an order to unseal all the documents or such portions as the court should direct. The application was heard in court and the judge directed certain items to be unsealed and refused the rest of the application. J appealed and A took the objection that the appeal against one part of the application (ie for unsealing all documents) was outside the period allowed for the notice of appeal to be filed. The Court of Appeal held that the matters decided were not clearly severable. Cotton LJ in his judgment (at p 603) said:

> But in this case we cannot decide what was separate or severable before we have heard the appeal, and, as the respondents had notice within the proper time after the order was made that there would be an appeal when the order was drawn up, I think we ought, if the objection would otherwise prevail, to give leave to serve the notice of appeal after the time. I am of opinion that the principle does not apply. I think it must be confined to cases where the application is clearly severable without entering into the question of appeal.

In *Trail* v *Jackson*,[5] the application was for judgment. The applicant took out a summons in the chambers of the Vice-Chancellor to prove in the estate of a testator for arrears of rent and also for £260 for dilapidations to three houses at the expiration of the lease. On 2 June 1976, the Vice-Chancellor allowed the application for rent and £61 for dilapidations in respect of one house but made no order on £199 in respect of the other three houses. The order was drawn up on 2 August 1976. Notice of appeal was given on 9 August 1976 that the order might be 'discharged, varied or set aside'. The Court of Appeal held that the applicant was out of time as 'The claims were separate applications although joined in one summons, and some of them were granted and some refused.'

Re Roberts[4] concerned the taxation of several bills of cost rendered by solicitors for work done in connection with two mortgages. The taxing master disallowed certain items, and Roberts, the solicitor, applied to the judge to review four items disallowed. The judge, on 5 August 1989, allowed one part of the first objection and disallowed the rest of it, and referred it back to the taxing master to state his answers to objections 2, 3 and 4. On 13 January 1990, Roberts gave notice of appeal against the order of 5 August 1989 and served it within 21 days from the date on which the said order had been passed and entered. The Court of Appeal, following *Trail* v *Jackson*,[5] held that the appeal was out of time as the refusal was in respect of a distinct objection.

Counsel for the appellant contended that the application to the judge to disqualify himself was not an application within the meaning of r 4(1)(b) and that it was part of his judgment pronounced on 3 August 1990. He referred to the decision in *Laird* v *Briggs*[6] where the Court of Appeal held that a refusal to allow an application to amend the defence was part of the trial. Jessel MR who delivered the only judgment said:

> The refusal of leave to amend is simply part of the trial. As you have appealed from the whole judgment the whole case will be open on the appeal, and if the Court of Appeal shall be of the opinion that you ought to have had leave to amend it will have power to give you leave then. There is no necessity for a separate appeal.

Counsel for the appellant submitted that the test as to whether the refusal of an application formed part of a judgment was the need to take out a formal order. If it was not needed, it was part of the judgment. He also relied on *Ooi Phee Cheng* v *Kok Yoon San*[7] where Thomson J struck out a notice of appeal against a decision of a judge confirming the assessment of damages made by the registrar which was worded in terms as to appeal against the original order of the court directing that damages be assessed. No appeal had been filed against that order. In our view, this submission had no merit. *Ooi Phee Cheng*'s case[7] did not support the suggested test as it dealt with an entirely different point. In *Laird* v *Briggs*[6] the court did not apply such test.

In the end, we found it unnecessary to determine whether the application by the appellant to disqualify the judge was an application in terms of r 4(1)(b). The notice of motion sought to strike out para 4(1) of the petition of appeal on the basis that it was an appeal against the judge's decision not to disqualify himself from hearing the case. In our view, the notice of motion failed on a plain reading of the notice of appeal and the petition of appeal. The notice of appeal was expressly directed at the decision of the judge given on 3 August 1990 and not his decision not to disqualify himself on 2 July 1990 assuming that that decision amounted to a refusal of the appellant's application in terms of r 4(1)(b). There was nothing in the said notice which referred to an appeal against the refusal of his application. The grounds of appeal in the petition of appeal were framed in support of the notice of appeal. Reading the petition of appeal and the notice of appeal as one, para 4(1) of the petition, which alleged apparent bias on the part of the judge, was simply one of the grounds on which the

appellant sought to reverse or set aside the judgment of the court. How or with what success the appellant would develop his argument was a matter to be determined at the hearing of the appeal. Para 4(1) could not be struck out on the grounds given in the notice of motion.

The notice of motion was accordingly dismissed with costs.

Motion dismissed.

Solicitors: *AL Hussien & Co; Lee & Lee.*

Reported by *Zarinah Marican*

Tan Hung Thiam & Anor v Public Prosecutor

COURT OF CRIMINAL APPEAL (SINGAPORE) — CRIMINAL APPEAL NO 16 OF 1988
YONG PUNG HOW CJ, CHUA AND KARTHIGESU JJ
23 APRIL 1991

Criminal Law — Murder — Common intention — Prosecution need not prove common intention to commit the offence that is actually committed — Penal Code (Cap 224, 1985 Ed), ss 34 & 304

Evidence — Medical evidence — Murder — Evidence of pathologist — Finding of fact by trial court

Both appellants were convicted in the High Court of having committed murder in furtherance of a common intention. The trial court found that they had both stabbed the deceased in the neck and that the stab wounds were the cause of death. Both appellants appealed against their convictions and disputed the medical evidence of the pathologist as to the cause of death.

Held, dismissing both appeals:

(1) The findings of the trial judges were correct. There was no doubt that both appellants had stabbed the deceased in the neck. The injuries were sufficient to cause death.

(2) In a criminal prosecution where common intention is invoked, it is not incumbent on the prosecution to prove that there existed between the participants a common intention to commit the crime actually committed. For s 34 of the Penal Code to apply it is sufficient if the prosecution prove that there was in existence a common intention between all the persons who committed the criminal act and that the act which constituted the offence charged was done in furtherance of that common intention.

Cases referred to

1 *Barendra Kumar Ghosh* v *Emperor* AIR 1925 PC 1 (refd)
2 *Mahboob Shah* v *Emperor* AIR 1945 PC 118 (refd)
3 *Mimi Wong & Anor* v *PP* [1972] 2 MLJ 75 (refd)
4 *Mohamed Yasin* v *PP* [1976] 1 MLJ 156 (refd)

Legislation referred to

Penal Code (Cap 224, 1985 Ed) ss 34, 302

MN Swami for the first appellant.
Sant Singh for the second appellant.
Seng Kwang Boon (Deputy Public Prosecutor) for the respondent.

Cur Adv Vult

Chua J (delivering the judgment of the court): The two appellants, Tan Hung Thiam and Ng Siang Hee, were convicted and sentenced to death by the High Court on the charge that they on 11 February 1985, at about 2.35am, at house No 34, Lor 22, Geylang, Singapore, in the furtherance of their common intention, committed murder by causing the death of Ho Hor Song, a female aged 85. They appealed against their conviction. We dismissed the appeals and now give our reasons.

The facts can be briefly summarized. At about 2.41am on the morning of 11 February 1985, in response to a report that there was a robbery, a number of police cars converged on No 34, Lor 22, Geylang, which was a brothel. Bloodstains were observed on the road immediately outside the gates of No 34 and on the concrete forecourt. A number of police officers entered the house by way of the staircase to the reception room on the front upper level. They saw an elderly female Chinese lying motionless, in a pool of blood, in the reception room. Blood trails led along the passageway leading to the back door and the toilet. The door of the toilet was closed but the light was on. A police officer kicked the door open. Inside were found the two appellants. Their hands and clothes were stained with blood. They were arrested.

When the ambulance arrived at 2.45am the ambulance officer pronounced the elderly female Chinese as dead. She was subsequently identified as Ho Hor Song ('the deceased'), the mother of the brothel keeper, Yeo Kim Boon (PW1).

The two appellants were led to separate police cars. Sgt Tan Boon Heng (PW2) asked the first appellant what had happened. The first appellant replied that he would tell Sgt Tan everything.

The first appellant said that his girl friend was pregnant and that he was in financial difficulties. He and the second appellant had been advised by a third man, Lau Ah Chiew, to rob the brothel. During the commission of the robbery the deceased had put up a struggle and the second appellant had stabbed her with a knife. He (the first appellant) had tried to prevent the second appellant from stabbing the deceased and his hand had been cut as a consequence. The second appellant had handed him a black purse and had asked him to throw away the knife outside the premises.

The first appellant then led Sgt Tan to a dustbin at the entrance to the compound of the house. Sgt Tan saw two bloodstained knives in the dustbin. Sgt Tan